

FORMAL OPINION NO. 2005-11
Conflicts of Interest, Former Clients:
Matter-Specific Conflicts

Facts:

Lawyer *A* was lawyer of record for Husband in a dissolution proceeding. Several years later, Wife approaches Lawyer *A* and asks Lawyer *A* to represent her in a proceeding to modify the previously entered decree by having custody of a child changed from Husband to Wife.

Lawyer *B* is employed by Smith to investigate a possible claim on behalf of Smith against a particular business. After Lawyer *B* begins to represent Smith but before litigation is filed, Lawyer *B* learns that the business is a sole proprietorship of Jones, a client of Lawyer *B* on unrelated matters. Lawyer *B* withdraws from representing Smith, and Smith retains other counsel, who files the lawsuit against Jones. Jones then asks Lawyer *B* to defend Jones in that litigation.

Lawyer *C* represents Richard in an action against a defendant for personal injury suffered by Richard in an automobile accident. Some time after this representation has begun, Freda, who was also injured in the same accident, approaches Lawyer *C* and asks Lawyer *C* to file an action against the same defendant arising out of the same accident; Lawyer *C* does so. Lawyer *C* later learns that the positions of Richard and Freda are adverse and that Richard ought to be pursuing a damages claim against Freda as well as against the common defendant. When Lawyer *C* explains this to Richard and Freda, Freda replies that she will get other counsel, but Richard replies that he would like Lawyer *C* to represent him against Freda as well as against the common defendant.

Lawyer *D* represents Maria and Henry in buying a corporation or partnership from third parties. When Maria and Henry later have a falling out, Maria seeks separate counsel, and Henry asks Lawyer *D* to represent him against Maria in connection with litigation or negotiations pertaining to dissolution of the corporation or partnership.

Questions:

1. May Lawyer *A* represent Wife against Husband?
2. May Lawyer *B* represent Jones against Smith?

3. May Lawyer *C* represent Richard against Freda?
4. May Lawyer *D* represent Henry against Maria?

Conclusions:

1. No, qualified.
2. No, qualified.
3. No, qualified.
4. No, qualified.

Discussion:

In each of these examples, the lawyer is seeking to take action adverse to a former client.¹ Oregon RPC 1.9 provides, in pertinent part:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

. . . .

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

¹ We assume that in each of these examples, the client has become a former client either by voluntarily seeking other counsel or because the prior representation had come to an end. A lawyer cannot "fire" a current client in mid-matter to avoid the current-client conflict of interest rules. *See, e.g., Picker Intern., Inc. v. Varian Assoc., Inc.*, 869 F2d 578, 582 (ND Ohio 1989); *Unified Sewerage Agency v. Jelco Inc.*, 646 F2d 1339, 1345 n 4 (9th Cir 1981); *Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F Supp 188, 193 n 7 (D NJ 1989).

Matters can be “substantially related” in either of two ways: (1) the lawyer’s representation of the current client will work some injury or damage to the former client in connection with the same matter² in which the lawyer represented the former client; or (2) there is a risk that confidential factual information learned in representing the former client could be used to advance the new client’s position. *See* ABA Model Rule 1.9, comment [3]. The “substantial relationship” limitation in Oregon RPC 1.9(a) is similar to the “matter-specific” and former client conflicts described in *In re Brandsness*, 299 Or 420, 702 P2d 1098 (1985). Given these similarities, we believe it is appropriate to continue to refer to matter-specific and information-specific former client conflicts.

We strongly caution, however, against an overbroad interpretation that would dilute the requirements that must be met before two matters can be said to be “the same or . . . substantially related.” For example, the fact that two matters may both involve the same disputants, the same industry, and some of the same facts will generally be insufficient, standing alone, to create a matter-specific conflict. *See, e.g., PGE v. Duncan, Weinberg, Miller & Pembroke*, 162 Or App 265, 986 P2d 35 (1999). Similarly, merely acquiring confidential information in a prior representation does not create an “information-specific” conflict if the information is not material to the new matter and cannot be used to materially advance the new client’s position. For a comprehensive discussion and collection of cases on this subject, which notes, among other things, the fact that courts in different jurisdictions have not always applied the rule consistently, see ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT §55:225.³

In each of the examples discussed above, however, the new matter that the lawyer is asked to handle is the same or substantially related to the lawyer’s earlier representation of the former client. *Compare Collatt*

² *Matter* is defined in Oregon RPC 1.0(i) as “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties.”

³ For additional Oregon ethics opinions on former-client conflicts questions, see OSB Formal Ethics Op Nos 2005-28 (conflict of interest in representing both sides in adoption), 2005-62 (representation of original and successor personal representatives), 2005-120 (former and current conflicts of interest), 2005-128 (conflict of interests when lawyer changes firms), 2005-174 (discussing former client conflict in public defender organization).

v. Collatt, 99 Or App 463, 782 P2d 456 (1989), with *In re Pierce*, 4 DB Rptr 1 (1990).

When a former client conflict is present, Oregon RPC 1.9(a) provides that a lawyer may represent the current client if each affected client gives informed consent in writing. *See, e.g., In re Sawyer*, 331 Or 240, 13 P3d 112 (2000) (lawyer had former-client conflict of interest and failed to seek consent from affected parties).⁴ If the former client conflict exists because the lawyer possesses confidential factual information relating to the former representation that could be used to the disadvantage of the former client in the current proceeding, the lawyer must specifically disclose this fact to have the former client's informed consent to the conflict. *Cf. OSB Formal Ethics Op No 2005-17; Vestron, Inc. v. National Geographic Soc.*, 750 F Supp 586, 595 (SDNY 1990).

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⁴ *See* Oregon RPC 1.0(g):

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that he client seek independent legal advice to determine if consent should be given.

See also Peter R. Jarvis, Mark J. Fucile & Bradley F. Tellam, *Waiving Discipline Away: The Effective Use of Disclosure and Consent Letters*, 62 OSB BULLETIN 69 (June 2002).

COMMENT: For additional information on this general topic and related subjects, see *PGE v. Duncan, Weinberg, Miller & Pembroke*, 162 Or App 265, 986 P2d 35 (1999) (former-client conflicts of interest and disqualification motions filed as a result thereof); THE ETHICAL OREGON LAWYER §§9.2–9.6 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–124, 128–132 (2003); and ABA Model Rule §1.9. *See also* OSB Formal Ethics Op Nos 2005-28 (conflict of interest in representing both sides in adoption), 2005-62 (representation of original and successor personal representatives), 2005-120 (former and current conflicts of interest), 2005-128 (conflict of interests when lawyer changes firms), 2005-174 (former client conflict in public defender organization).